STATE OF MICHIGAN
IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees,

v

THE MEMORIAL HOSPITAL, a Michigan Non-Profit Corporation, d/b/a MEMORIAL HEALTHCARE CENTER,

Defendant,

AND

RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., and JAMES H. DEERING, D.O., P.C., d/b/a SHIAWASSEE RADIOLOGY CONSULTANTS, P.C., Jointly and Severally,

Defendants-Appellants.
_____/

Supreme Court No. 129134

Court of Appeals No. 251110

Lower Court Case No. 01-007289-NH

129134

DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF LEAVE TO APPEAL

Respectfully submitted,

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REPLY ARGUMENT

Plaintiff-appellees Sue and Robert Apsey's ("Appellees") Response misconstrues defendant-appellants James H. Deering, James H. Deering, D.O., P.C., and Russell H. Tobe, D.O.'s ("appellants") Application for Leave to Appeal the Court of Appeals decision in *Apsey v Memorial Hospital (On Reconsideration)* ("*Apsey II*"), 266 Mich App 666; ___ NW2d ___ (2005). First, Appellees mistakenly assert that *Apsey II* is not a purely prospective decision when the *Apsey II* Court itself stated: "In light of the apparent reliance on the URAA by the legal community, **we believe that justice requires a prospective application**." *Apsey II*, 266 Mich App at ___ (emphasis added). Second, Appellees ignore this Court's recent decision in *Devillers v ACIA*, 473 Mich 562 ; ___NW2d ___ (2005) rejecting both the propriety of purely prospective decisions and blanket equitable remedies. Third, Appellees mistakenly assert that Appellants made a subject-matter jurisdiction argument when Appellants' Application referred to "**jurisdiction *over the particular case*, as opposed to subject-matter or personal jurisdiction**." (Appellants' Application, p 21; emphasis added & italics original). As a result, Appellees' failure to grasp the issues presented renders the entire Response meaningless, and Appellants' Application stands effectively unanswered.

I. THE *APSEY II* COURT UNEQUIVOCALLY STATED THAT ITS DECISION WAS LIMITED TO PROSPECTIVE APPLICATION AND ALLOWED ALL PARTIES TO CURE ANY DEFECTS REGARDLESS OF THE STATUTE OF LIMITATIONS. THE DECISION WAS, THEREFORE, PURELY PROSPECTIVE AND IMPROPER.

Appellees' primary assertion is that *Apsey II* is not a purely prospective decision because "its ruling [regarding MCL 600. 2102's certification requirements] would apply to this case and *every other pending case*." (Appellees' Response, p 6). But the Court's holding that § 2102's certification requirement still applies to Affidavits of Merit ("AOMs") – notwithstanding the URAA – is not all the *Apsey II* Court decided. Importantly, the Court also held a party could not cure a § 2102 defect by simply filing a certification after the fact; specifically, that "**a belatedly filed certification of an out-of-state notary public would not cure the defect in an otherwise timely complaint and affidavit.**" *Apsey II*, 266 Mich App at ___ (emphasis added). If the *Apsey II* Court applied *this holding* to "this case and every other pending case," it would have affirmed the trial court.

Instead, the *Apsey II* Court clearly and unequivocally stated that "**we believe that justice requires a prospective application**" of the holding in this case. *Id.* at ___ (emphasis added). Even though *Apsey II* required, as Appellees assert, "lawyers around this state . . . to determine whether affidavits obtained out-of-state" comply with § 2102, the fact that these lawyers were able to do so indicates that the *Apsey II* Court *did not fully apply its decision to their cases*. In light of the *Apsey II* Court's own statement, Appellees' assertion that the decision was *not* prospective defies understanding.

II. THIS COURT'S RECENT DECISION IN *DEVILLERS* REINFORCES ITS REJECTION OF PURELY PROSPECTIVE JURISPRUDENCE, AND APPELLEES FAIL TO PROVIDE AUTHORITY THAT WOULD ALLOW THE COURT OF APPEALS TO ISSUE SUCH A PURELY PROSPECTIVE OPINION AT ALL.

Notably, Appellees fails to address the merits of Appellants' arguments regarding the Court of Appeals's authority to issue prospective decisions or the propriety of issuing such an opinion when merely enforcing pre-existing law. Instead, Appellees indicate that *Apsey II* should have been limited prospectively because "nothing in Michigan law foreshadowed . . . that [§ 2102] would effectively obliterate the URAA." (Appellee's Response, p 10). This assertion not only ignores the authority cited in Appellants' Application but also this Court's recent decision in *Devillers v ACIA*, 473 Mich 562 ; ___NW2d ___ (2005), which reaffirmed the principles Appellants rely on from *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004).

In *Devillers*, this Court overruled *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), but refused to limit its decision prospectively. Specifically, this Court stated:

> **As we reaffirmed recently in *Hathcock*, prospective-only application of our decisions is generally "'limited to decisions which overrule *clear and uncontradicted case law.*'"** . . . . ***Lewis* itself rests upon case law that consciously and inexplicably departed from decades of precedent** holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms. [*Devillers*, 473 Mich at ___; italics original & emphasis added.]

Moreover, this Court again expressed its reluctance to prospectively limit a decision even under these circumstances, stating:

> As we explained in *Hathcock*, *supra* at 484 n 97, **to accord a holding only prospective application is, essentially, an exercise of the legislative power to determine what the law shall be for all future cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to the case at hand. Const 1963, art 3, § 2 prohibits this**

> **Court from exercising powers properly belonging to another branch of government except when expressly authorized by the Constitution.** As we further explained in *Hathcock*, *supra* at 484 n 98, prospective opinions are, in essence, advisory opinions, and our only constitutional authorization to issue advisory opinions is found in Const 1963, art 3, § 8, which does not apply in this case. [*Devillers*, 473 Mich at ___ n 57; emphasis added.]

Here, the only *"clear and uncontradicted case law"* at issue *supports* the *Apsey II* Court's interpretation of § 2102;[1] the Court did not overrule *any* precedent to reach its conclusion, much less questionable precedent. As a result, there was absolutely no basis for the *Apsey II* Court's prospective limitation of its decision based under the *Hathcock* analysis, and this Court should grant leave or reverse on this basis.

This begs the question, however, of whether the Court of Appeals had the authority to issue a purely prospective opinion even if the circumstances warranted it. As this Court noted in *Devillers*, such a prospective decision is an exercise of legislative power and "Const 1963, art 3, § 2 prohibits this Court from exercising powers properly belonging to another branch of government except when expressly authorized by the Constitution." *Devillers*, 473 Mich at ___ n 57. This Court has only limited authority to issue such opinions, and the Court of Appeals has none.[2] Appellees provide no such authority and no argument that it exists.

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[1] *Berkery v Reilly*, 82 Mich 160; 46 NW 436 (1890), and *In re Alston's Estate*, 229 Mich 478; 201 NW 460 (1924).

[2] *Judicial Attorneys Ass'n v Michigan*, 228 Mich App 386, 427; 579 NW2d 378 (1998), aff'd in part and vacated in part 460 Mich 590; 597 NW2d 113 (1999) (Markman, J., dissenting) ("This Court [of Appeals] does not to have the power to issue advisory opinions and ought not to arrogate this extraordinary authority to itself. See Const 1963, art 3, § 8.").

As a result, this Court should grant leave to consider this issue or peremptorily reverse *Apsey II* for lack of authority.

III. THIS COURT HAS ALSO RECENTLY REJECTED BLANKET EQUITABLE REMEDIES, SUCH AS THE *APSEY II* COURT USED, IN *DEVILLERS*.

Appellees assert that *Apsey II* is an equitable, not a purely prospective, decision similar to this Court's decision in *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004). Appellants have already established that *Apsey II* was in fact prospective, but must now address Appellees' faulty assumption that equity allows the Court of Appeals to fashion broad remedies for an entire class of litigants whose specific circumstances are not even before the Court.

A court's equitable "power has traditionally be reserved for 'unusual circumstances' such as fraud or mutual mistake. [Accordingly,] **[a] court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking.**" *Devillers*, 473 Mich at ___. Yet that is precisely what the *Apsey II* Court did here by constructing a blanket equitable remedy to address what it saw as an unfair result. This Court rejected such a measure in *Devillers* for the precise reasons Appellants articulated in their Application: it allows courts to supersede the Legislature.[3] As this Court explained in *Devillers*:

> Indeed, if a court is free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as "unfair," then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. **Instead, an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. While such an**

[3] See Appellants' Application, Grounds for Granting Leave to Appeal, pp 6-8.

> **approach might be extraordinarily efficient for a particular litigant, the amount of damage it causes to the separation of powers mandate of our Constitution and the overall structure of our government is immeasurable.** [*Devillers*, 473 Mich at ___; emphasis added.]

Here, appellees and their innumerable amici supporters did exactly what this Court feared in *Devillers*: they found judges willing to set aside the law in the name of fairness. More importantly, the *Apsey II* Court did so, not because some specific set of facts precluded Appellants from relying on § 2102, but because applying the law itself was unfair. The *Apsey II* Court therefore became a de facto legislature, deciding when and when not to apply the relevant statutes.

Bryant also fails to help Appellees in this case. In *Devillers*, this Court distinguished its use of equity in *Bryant*, 471 Mich at 432, from an approach that applied equity to more than one case at a time:

> In *Bryant*, our grant of equitable relief was a pinpoint application of equity based on the particular circumstances surrounding the plaintiff's claim; namely, the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate. Accordingly, our limited application of equity in *Bryant* was entirely consistent with the "unusual circumstances" standard for equitable relief discussed above. In *Lewis*, however, **the Court chose to adopt an a priori rule of equity without regard to the particular circumstances of litigants in a given case. In granting blanket equity to an entire class of cases, therefore, the *Lewis* Court essentially rewrote § 3145(1). Such a categorical redrafting of a statute in the name of equity violates fundamental principles of equitable relief and is a gross departure from the proper exercise of the "judicial power."** Const 1963, art 3, § 2 and art 6, § 1. [*Devillers*, 473 Mich at ___ n 65; emphasis added.]

Like the *Lewis* Court, the *Apsey II* Court's decision created "an a priori rule of equity without regard to the particular circumstances of litigants in a given case." *Id.* at ___ n 65. The Court had no idea of the circumstances of other cases to determine whether equity

required that they be allowed to cure a defective AOM. Instead, "[i]n granting blanket equity to an entire class of cases," the *Apsey II* Court rewrote § 2102 as though the URAA superseded it until the Court's decision. *Id.* As this Court recognized in *Devillers*, this was an improper exercise of judicial power.

Moreover, the *Apsey II* Court did not even consider the circumstances of the case before it *because Appellees failed to even mention the URAA until the trial court had already granted Appellants' motion for summary disposition.*[4] After they lost, Appellees filed a motion for reconsideration alleging that the URAA was the reason for their failure to comply with § 2102. Even the *Apsey II* Court could not state that Appellees *actually relied* on the URAA, but instead made its decision "[i]n light **of the apparent reliance on the URAA by the legal community** . . . ." *Apsey II*, 266 Mich App at ___ (emphasis added).

So both Appellees' insistence that *Apsey II* was a proper exercise of equitable jurisdiction and their reliance on *Bryant* are unavailing in light of this Court's decision in *Devillers*. Neither justifies the *Apsey II* decision.

IV. APPELLANTS HAVE ARGUED THAT A DEFECTIVE AOM PRECLUDES THE EXERCISE OF JURISDICTION *OVER THE PARTICULAR CASE*, NOT SUBJECT-MATTER JURISDICTION. APPELLEES HAVE NO RESPONSE FOR THIS ARGUMENT.

Finally, Appellees assert that the trial court had jurisdiction over this case because the court had subject-matter jurisdiction over medical malpractice cases – as a general class of cases. If, however, Appellees had actually read the Application, they would have

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[4] See Exhibit A, Excerpt from Appellee's Court of Appeals Brief, p 1.

realized that Appellants do not contest subject-matter jurisdiction or personal jurisdiction, but jurisdiction *over the particular case*. Because failure to file an effective AOM is a failure to "commence" the action,[5] there is no actual case before the court over which personal or subject-matter jurisdiction may be exercised.

This concept may seem illusive, but it can be easily illustrated. A court may have subject-matter jurisdiction over contract actions, and general personal jurisdiction over potential parties who reside in the state. But unless a complaint for breach of contract is properly filed with the court, *there is no case over which the court has jurisdiction*. If the action is never "commenced," it does not exist. As Appellants stated in their Application, Michigan recognizes this concept but does not give it a specific name. See *Fox v Martin*, 287 Mich 147, 152; 283 NW 9 (1938) ("Mere possession of power to act in respect to a specific subject-matter is of no consequence unless that power is properly invoked.").[6]

To avoid redundancy, Appellants will not re-argue this point here, especially since Appellees have utterly failed to address it. In summary, Appellants assert that because Appellees failed to properly "commence" this action, the Court of Appeals had no choice but to dismiss this case. The *Apsey II* Court erred when it did otherwise, and this Court must reverse this error as well, or alternatively, grant leave to consider it.

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[5] *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000).

[6] See also *Haenlein v Saginaw Trades Council*, 361 Mich 263, 270; 105 NW2d 166 (1960) "(**Having duly acquired jurisdiction -- conferred by the plaintiff's bill and the defensive pleadings as filed** . . . .") (emphasis added); *Millard v Lenawee Circuit Judge*, 107 Mich 134, 135; 64 NW 1046 (1895) (dealing with an affidavit requirement for garnishments) ("**Where the affidavit is made upon the same day with the commencement of suit, the court acquires jurisdiction.**") (emphasis added).

CONCLUSION

Appellees' Response carefully avoids the substance of Appellants' Application, and for that reason is unworthy of much attention. Appellees ignore that the Court of Appeals has absolutely no authority to issue purely prospective advisory "opinions," ignore that the *Apsey II* Court refused to fully apply its decision to the parties or other existing cases, and ignore that the *Apsey II* Court itself stated that its opinion that "[f]airness and public policy both support a prospective application . . . ." *Apsey II*, 266 Mich App at ___. Moreover, Appellees ignore that this Court has rejected the application of blanket equitable remedies to effectively override statutes in *Devillers*. And finally, Appellees ignore that although the trial court may have had subject-matter jurisdiction over medical malpractice actions as a class of cases, that does not excuse their failure to properly "commence" this case by filing an effective AOM. As a result of this failure, the trial court never acquired jurisdiction over this particular case, and dismissal was mandated.

For these reasons, Appellants respectfully renew their request for this Court to reverse *Apsey II* in part and affirm the trial court's dismissal of this action, or in the alternative, grant leave to appeal.

Respectfully submitted,

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Dated: September 7, 2005

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